APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1811

TANYA ENGLISH,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Raymond A. Jackson, District Judge. (CA-99-1244-2)

Submitted: November 30, 2000 Decided: December 20, 2000

Before LUTTIG, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael D. Kmetz, Norfolk, Virginia, for Appellant. David W. Ogden, Assistant Attorney General, Helen F. Fahey, United States Attorney, Robert S. Greenspan, E. Roy Hawkens, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. Local Rule 36 (c).

PER CURIAM:

Tanya English appeals the district court's order granting the United States' motion to dismiss her Federal Torts Claim Act action under Fed. R. Civ. P. 12(b)(1), (6). We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. English v. United States, No. CA-99-1244-2 (E.D. Va. May 24, 2000). * We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

* Although the district court's order is marked as "filed" on May 23, 2000, the district court's records show that the order was entered on the docket sheet on May 24, 2000. Pursuant to Fed. R. Civ. P. 58 and 79(a), we consider the date the order was entered as the effective date of the district court's decision. See Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TANYA ENGLISH,

Plaintiff,

v. CIVIL ACTION NO. 2:99CV1244

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant's motion, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. For the reasons stated below, Defendant's Motion to Dismiss is **GRANTED.**

1. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is the widow of deceased Navy Petty Officer Michael A. English, who at the time of his death was stationed at Northwest Security Group Activity in Chesapeake, Virginia. According to the Complaint, Plaintiff had made several complaints to English's commanding officers prior to English's death regarding his suicidal ideations, mood swings, and violent temper, which

included anger and violence directed at Plaintiff. During the court of these complaints, Plaintiff requested that English be placed in counseling or treatment through Navy medical facilities. However, no one responded to her entreaties, and no action was ever taken to meet the needs of Plaintiff or her husband.

On March 6, 1995, English shot and injured Plaintiff and then committed suicide. Plaintiff alleges that her injuries resulted from the negligence of Defendant United States in failing to protect Plaintiff from English and in failing to provide English with appropriate medical and psychological treatment.

Plaintiff filed this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671-2680, on August 4, 1999, requesting relief in the amount of ten million dollars. On December 10, 1999, Defendant filed the instant motion to dismiss. Plaintiff filed her response on December 23, 1999, and Defendant filed its response on December 30, 1999. Neither party has requested a hearing, and the Court finds that a hearing would not aid in the determination of this matter. Accordingly, the matter is ripe for judicial decision.

II. LEGAL STANDARDS

In the context of a Rule 12(b)(1) motion to dismiss, the plaintiff has the burden of proving subject matter jurisdiction. *See Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 768 (4th Cir. 1991). All factual allegations in the Complaint are assumed to be true. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). The Court may consider evidence outside the pleadings to determine whether subject matter jurisdiction exists. *See Richmond*, 945 F.2d at 768. Furthermore, "[t]he moving party should prevail only if the material jurisdictional facts are not in

dispute and the moving party is entitled to prevail as a matter of law." *Id.*

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint that fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss should not be granted unless it is beyond doubt that Plaintiff can prove no set of facts which would entitle him to relief. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the Court must accept as true the allegations in the Complaint and draw all reasonable inferences in favor of the Plaintiff. *See Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Boring v. Buncombe County Bd. Educ.*, 136 F.3d 364, 367 (4th Cir. 1998). Thus, the standard for granting a motion to dismiss pursuant to Rule 12(b)(6) is strict. *See Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978).

III. DISCUSSION

A. Sovereign Immunity and the Federal Torts Claims Act

The United States is immune from suit unless it specifically waives its sovereign immunity. Absent such waiver, the Court does not have subject matter jurisdiction over an action against the United States. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Orleans*, 425 U.S. 807, 813-14 (1976). The consent to suit must be statutory and specific, and waivers of sovereign immunity must be strictly construed. *See United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Radin v. United States*, 699 F.2d 681, 684-85 (4th Cir. 1983). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, provides for a limited waiver of sovereign immunity for certain torts committed by government employees acting in the scope of

their employment. *See* 28 U.S.C. § 1346(b)(1). Under the FTCA,

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employees of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

However, the FTCA creates several exceptions to its waiver of sovereign immunity for tort claims. Section 2670(h), the "intentional torts" exception, provides that the waiver does apply to

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .

28 U.S.C. §2680(h). It is well-settled that this exception bars suit attempting to hold the United States directly liable, on a *respondeat superior* theory of liability, for an assault or battery committed by a government employee. *See Stepp v. United States*, 207 F.2d 909, 911 (4th Cir. 1953).

Following the plurality opinion of the United States Supreme Court in *United States v. Shearer*, 473 U.S. 52 (1985),

the United States Court of Appeals for the Fourth Circuit has held that negligent supervision claims are also barred by the intentional torts exception if the claim actually arose out of an assault or battery by a government employee. *See Thigpen v. United States*, 800 F.2d 393, 395 (4th Cir. 1996); *Hughes v. United States*, 662 F.2d 219, 220 (4th Cir. 1981). *Hughes* arose out of a postal letter carrier's sexual assault on two young girls. Several years before, the postal worker had been arrested for similar conduct, and had pleaded guilty to lesser charges. The plaintiff claimed that the United States was negligent in failing to relieve the postal worker of his duties after the first incident. The court held that, although the claim was framed in terms of negligence, it actually arose out the batteries committed by the postal worker, and thus was barred by section 2680(h). *See Hughes*, 662 F.2d at 220. Similarly, *Thigpen* involved the sexual assault of two young girls by a naval hospital employee. The plaintiff sued the United States for negligence, based on the failure of the physicians and hospital staff to properly supervise the employee. The court found that the intentional torts exception bars all claims, even those alleging negligence, that "rely on the existence of an assault or battery by a government employee." *Thigpen*, 800 f.2d at 392.

However, in *Sheridan v. United States*, 487 U.S. 392 (1988), the Supreme Court held that the intentional torts exception to the FTCA does not preclude government liability for negligence based on an assault or battery by a government employee in all situations. *Sheridan* involved an assault and battery by an intoxicated off-duty navy serviceman who fired shots at plaintiff's automobile as it drove down a public street. The court found that the section 2680(h) exception is inapplicable to torts committed by a government employee not acting within the scope of his employment, since such torts do not fall under the section 1346(b) waiver in the first instance. *See Sheridan*, 487

U.S. at 401. The court then held that the negligence of government employees who allow a foreseeable battery to occur could furnish an independent basis for liability under state law. *See id.* at 401-03.

The court in *Sheridan* did not consider whether supervision, training, or hiring based on a foreseeable assault or battery could ever provide the basis for liability under the FTCA. However, the Fourth Circuit has indicated that the Supreme Court's holding in *Sheridan* did not affect its pre-*Sheridan* rule that negligent supervision claims arising out of an assault or battery are barred by the intentional torts exception to the FTCA. *See Sheridan v. United States*, 969 F.2d 72, 75 (4th Cir. 1992); *Perkins v. United States*, 55 F.3d 910, 916-17; *Wise v. United States*, 8F. Supp. 2d 535, 545 (E.D. Va. 1998).

Plaintiff claims that the United States was negligent for failing to properly control or counsel English, despite his supervisors' awareness of his violent temper. Plaintiff alleges that the United States is liable for English's intentional tort because, as his employer, it had a duty to control and care for him. This is essentially a negligent supervision claim, which is barred by section 2680(h). *See Sheridan v. United States*, 969 F.2d at 75. Although the claim is framed in terms of negligence, it depends entirely on the underlying battery committed by English, and thus falls within the purview of the intentional torts exception. *See Thigpen*, 800 F.2d at 395-96; *Hughes*, 662 F.2d at 220; *Wise*, 8 F. Supp. 2d at 545. Thus, Plaintiff's claim is barred because the United States has not waived its sovereign immunity to the suit. Accordingly, the Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

B. Liability Under Virginia Law

However, the Court nevertheless considers whether the negligence of the government's employees furnishes a basis for liability under state law, independent of English's employment status. *See Sheridan v. United States*, 487 U.S. at 401. Plaintiff argues that the United States' knowledge of English's violent temper and attempts to take charge of English render it liable for negligence without regard to English's status as a member of the military. Accordingly, the Court must determine whether, under Virginia law, the United States may be held liable for negligence for failing to control English or protect Plaintiff.

Under Virginia law, there can be no liability for negligence unless there is a legal duty, a violation of that duty, and resultant damage. *See Fox v. Custis*, 372 S.E. 2d 373, 375 (Va. 1988). Thus, the Court must first determine whether the United States owed a duty of care to Plaintiff. *See id.*

A person ordinarily has no duty to control the third persons in order to prevent harm to another. *See id.* Virginia follows the Restatement rule that no such duty exists unless (a) there is a "special relation" between the defendant and the third party which imposes a duty on the defendant to control the third person's conduct; or (b) there is a "special relation" between the defendant and the plaintiff which gives the plaintiff a right to the defendant's protection. *See Marshall v. Winston*, 389 S.E. 2d 902, 904 (Va. 1990) (quoting Restatement (Second) of Torts § 315 (1965)); *Fox*, 372 S.E. 2d at 74 (same). A special relationship exists between the defendant and a third party if the defendant "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled." *Marshall*, 389 S.E. 2d at 904 (quoting Restatement (Second) of Torts § 319 (1965)).

Plaintiff argues that Defendant knew English was dangerous and likely to cause injury, because Plaintiff had repeatedly expressed her concerns to his supervisors and requested their assistance. Plaintiff alleges that Defendant's knowledge of English's dangerous propensities is further evidenced by the fact that it banned him from the intramural basketball team due to his violent temper. According to Plaintiff, there was a special relationship between the United States and English stemming from the Navy's extensive control over English, as a military serviceman. Plaintiff maintains that the fact that the Navy could order English to undergo psychological counseling and the fact that it could, and did, ban English from the intramural basketball team demonstrate that Defendant clearly took charge of English to such an extent that it created a special relationship.

The case law makes clear that a defendant has not taken charge of a third person unless the defendant is vested with a heightened ability to control and direct the third party's actions. This contemplates active and continuous supervision by the defendant over the third party; a defendant's ability to control the third party only under certain specific circumstances is insufficient to create a special relationship.

In *Fox* the court found that parole officers did not take charge of a parolee such that a special relationship was formed. *See Fox*, 372 S.E. 2d at 376. *Fox* involved a parolee who had been released from incarceration and had committed several crimes while on parole. The victims sued the state parole officers, contending that because they were statutorily required to "supervise and assist" the parolee throughout the period of parole, they had sufficient control over the parolee to create a special relationship. The court found that the parole officers did not enjoy "hourly or daily dominance and dominion" over the parolees, noting

that although the parolees were required to adhere to specific rules and to report certain activities to the parole officers, they were "essentially free to conduct their day-to-day affairs." *Fox*, 372 S.E. 2d at 376. It thus held that no special relationship was formed. *See id.* Following the reasoning in *Fox*, Virginia courts have also held that an ordinary doctor-patient relationship does not give the doctor control over the patient sufficient to establish a special relationship. *See Nasser v. Parker*, 455 S.E. 2d 502, 506 (Va. 1995); *see also Sage v. United States*, 974 F. Supp. 851, 861-62 (E.D. Va. 1997).

The Virginia Supreme Court did find a special relationship to exist in *Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 401 S.E. 2d 878 (Va. 1991). *Dudley* involved a convicted felon who was serving a portion of his sentence in a halfway house. The security at the halfway house was extremely law, and the residents, all convicted felons, were left essentially unsupervised. The felon was thus able to escape undetected one evening, whereupon he raped and murdered a young woman. Plaintiff sued the owner and operated of the halfway house for negligently managing it. The court found that because the felon was still serving his sentence, he was still in the custody of the Department of Corrections, which had contracted his care to the halfway house. In assuming that custody from the Department of Corrections, the halfway house necessarily took charge of the prisoner within the meaning of the Restatement. The court contrasted the circumstances in *Fox*, noting that, unlike the parole officers in *Fox*, the halfway house "undertook a responsibility for very close and continuous supervision of its inmates." *Dudley*, 401 S.E. 2d at 881-82.

The circumstances of this case are not unlike those confronted by this court in *Wise v. United States*, 8 F. Supp. 535 (E.D. Va. 1998). In *Wise*, a woman was sexually assaulted and murdered by two off-duty members of the

Navy SEALs. The plaintiff alleged that since the purpose of SEAL training is to turn the trainee into a lethal weapon with a heightened sense of invincibility, the government had a duty to protect people coming into contact with a SEAL and to control SEAL members. The court found that no special relationship existed between the United States and the Navy SEALs, stating that "the government does not have a duty to control the actions of an off-duty soldier. The fact that the government has the power to exert complete authority over off-duty servicemen does not create a "special relationship" giving rise to a special duty to control their off-duty actions." *Wise*, 8 F. Supp. 2d at 549. The court noted that, like the parolee in *Fox*, the soldiers did not lose their right to freedom of movement merely by enlisting in the Navy, and that the government did not exercise continuous hourly or daily dominance over them. *See id; see also Sage*, 974 F. Supp. At 860, n. 7 (declining to find that the mere existence of a military relationship creates a "special relationship" under Virginia law).

Plaintiff here, like the plaintiff in *Wise*, attempts to establish the existence of a special relationship between English and the United States merely by virtue of English's status as an enlisted member of the military. The Court finds this status alone to be insufficient to satisfy the strict standard delineated by the cases discussed above. *See Wise*, 8 F. Supp. 2d at 549. Furthermore, the fact that English was required to use military facilities and to obtain permission from his commanding officers before seeking medical or psychological counseling, and that Defendant had the ability to order him to obtain counseling, does not vest Defendant with such extraordinary control over English

that it can be said to have "taken charge" of him.[1] Nor does the fact that the government controlled English's ability to play in the intramural basketball league create a special relationship. The basketball league constitutes only a small, presumably optional, part of a soldier's daily activities. The government's requirement that English adhere to certain specific rules, both in the context of the basketball league and in the context of obtaining medical services, does not imply its "hourly or daily dominance and dominion" over him, *see Fox*, 372 S.E. 2d at 376, and does not constitute the "very close and continuous supervision" required to establish a special relationship. *See Dudley*, 401 S.E. 2d at 881.

The Court thus finds that the United States had no duty to control English such that it was required to protect Plaintiff from any harm he might cause her. Accordingly, the Court finds that there is no basis under Virginia law for holding the United States liable for Plaintiff's injuries. To the extent Plaintiff's Complaint alleges state law claims independent of English's employment status, it must be dismissed pursuant to Rule 12(b)(6).

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[1]Plaintiff's reliance on *Solorio v. United States*, 483 U.S. 435 (1987), for the proposition that the United States military has worldwide jurisdiction over an active-duty service member is inapposite. *Solorio* examined the scope of court-martial jurisdiction, an issue entirely separate from, and irrelevant to, the extent of the government's control over the day-to-day movements of a service member.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is **GRANTED.**

The Clerk is **DIRECTED** to send a copy of this Order to counsel for Plaintiff and to counsel for Defendant.

IT IS SO ORDERED.

/s/
Judge

Norfolk, Virginia
May 23, 2000

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 20, 2001

No. 00-1811
CA-99-1244-2

TANYA ENGLISH,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied;

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

FILED:
February 9, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1811
(CA-99-1244-2)

TANYA ENGLISH,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

ORDER

This case was affirmed by unpublished per curiam opinion on December 20, 2000. Appellant has filed a motion to stay mandate and to enlarge time for filing a petition for rehearing en banc. Appellant's counsel alleges in the

motion that appellant's copy of this Court's decision was mailed to the wrong address and counsel first learned of this Court's decision by telephone on February 5, 2001.

The Court grants appellant an extension of time until February 23, 2001 within which to file timely a petition for rehearing and/or a petition for rehearing en banc.

For the Court - By Direction

/s/ Patricia S. Connor

CLERK